



west virginia  
DIVISION OF PERSONNEL

**SUPERVISOR'S GUIDE**  
**TO THE**  
**FAIR LABOR STANDARDS ACT**

**Employee Relations Section**  
**January 2020**

## **DISCLAIMER**

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The purpose of this Supervisor's Guide to the Fair Labor Standards Act is to provide agencies with an overview of those aspects of the federal Fair Labor Standards Act of 1938 (FLSA), as amended, which are most commonly encountered in the course of business. This guide is intended to provide managers with a general understanding of those provisions and is not intended to be all-inclusive or utilized as a protocol in addressing FLSA issues. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail.

This booklet is written with the understanding that the West Virginia Division of Personnel (DOP) is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also consult with the United States Department of Labor (U.S. DOL) and refer to the policies, rules and regulations as well as consult with the human resources office within his or her respective agency.

For technical assistance concerning specific situations, employees and employers may contact the DOP's Employee Relations Section at 304-414-1853.

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# FAIR LABOR STANDARDS ACT

## I. Introduction

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.

The U.S. Department of Labor's Wage and Hour Division administers and enforces FLSA with respect to private employment, state and local government employment, and federal employees of the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority. The FLSA is enforced by the United States Office of Personnel Management for employees of other Executive Branch agencies, and by the United States Congress for covered employees of the Legislative Branch.

Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of cash overtime pay.

State and local governments have been subject to FLSA minimum wage provisions since April 15, 1985. On April 18, 1986, U.S. DOL proposed regulations extending the minimum wage and overtime provisions to state and local governments. Salary tests eliminated executive, administrative, and professional exemptions for public employers because principles of public accountability prevent payment for time not worked. However, in August 1992, final regulations remedied the situation by amending the salary test for "white collar" exemptions, by allowing docking of exempt employees' pay for partial-days absences. This provides that "white collar" exemptions are not lost for public employees subject to a pay system "established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability."

*Adkins v. City of Huntington*, 445 S.E.2d 500 (W. Va. 1994), held, in pertinent part, that "... a city, as a political subdivision of the state, is entitled to the statutory exemption for qualifying employers in West Virginia Code § 21-5C-1(e) and therefore, is not subject to the overtime pay requirements imposed by West Virginia Code § 21-5C-3(a)." The logic in *Adkins* may be reasonably applied to conclude that the State of West Virginia, as an employer, is not subject to overtime pay requirements imposed by West Virginia Code § 21-5C-3(a), but are subject to the overtime provisions contained in FLSA.

## II. Exclusions

Certain individuals employed by public agencies are excluded from the definition of “employee” in the FLSA and, thus, from coverage. This exclusion applies to elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. In addition, the 1985 Amendments exclude employees of legislative branches of state and local governments. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing state or local agency.

The FLSA provides for an exclusion from coverage for officials elected by the voters of their jurisdictions. Also excluded are personal staff members and officials in policymaking positions who are selected or appointed by the elected public officials and certain advisers to such officials. The statutory term “member of personal staff” generally includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such official. The term typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

In order to qualify as personal staff members or officials in policymaking positions, the individuals in question must not be subject to the civil service laws of their employing agencies. The term “civil service laws” refers to a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment of employees under civil service, except for cause, is provided. In addition, such personal staff members must be appointed by, and serve solely at the pleasure or discretion of, the elected official. The exclusion for “immediate adviser” to elected officials is limited to staff who serve as advisers on constitutional or legal matters, and who are not subject to the civil service rules of their employing agency.

The FLSA provides an exclusion from the definition of the term “employee” for individuals who are not subject to the civil service laws of their employing agencies and are employed by legislative branches or bodies of states, their political subdivisions, or interstate governmental agencies. Employees of state or local legislative libraries do not come within this statutory exclusion.

### III. General Provisions

The FLSA does not require:

- Extra pay for Saturdays, Sundays, or holidays, as such;
- Pay for vacations or holidays, or severance pay;
- Discharge notices;
- Limits on the number of hours of work for persons 16 years of age or over, as long as overtime pay provisions are met; and
- Time off for holidays or vacations.

The Equal Pay Act (EPA) was enacted in 1963 as an amendment to the FLSA. The EPA prohibits discrimination between employees on the basis of sex regarding the compensation received by employees within an establishment for work performed under similar working conditions that requires equal skill, effort, and responsibility.

The FLSA contains provisions regulating child labor that prescribe both minimum wages and maximum hours to be worked. Lower minimum ages for workers are permitted in certain occupations.

Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, albeit voluntarily, are engaged in compensable working time. The reason for the work is immaterial; as long as the employer “suffers or permits” employees to work on its behalf, proper compensation must be paid.

The FLSA requires employers to pay nonexempt employees a rate at least equal to the federal minimum wage and an overtime rate of one-and-one-half times the employees’ regular rates for time actually worked in excess of 40 hours in a workweek. The FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis. A “work period” may be from 7 consecutive days to 28 consecutive days in length.

#### **IV. “White-Collar Exemptions”**

The U.S. DOL released revisions to the FLSA’s white-collar exemptions from overtime, effective January 1, 2020. The revisions increased the standard salary level to \$684 per week or \$35,568.00 annually, for full-time salaried workers. The revisions also increased the highly compensated employee’s salary level to \$107,432.00 annually.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage and overtime pay at time and one-half the regular rate of pay for all hours actually worked over 40 in a work week. However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13 (a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$684 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the U.S. DOL’s regulations.

Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis. If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the U.S.DOL permits the employer to make a “catch-up” payment within one pay period of the end of the 52-week period. This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year’s salary amount and not toward the salary amount in the year in which it is paid.

The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Employers must comply, for example, with any federal, state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

The exemptions provided by FLSA Section 13(a)(1) apply only to bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and 13(a)(17) also exempt certain employees in computer-related occupations.

The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremens, construction workers and laborers are entitled to minimum wage and overtime premium pay under FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

First Responders: The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees (first responders), regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work are not exempt under Section 13(a)(1) or the regulations and thus are protected by the minimum wage and overtime provisions of the FLSA.

First responders generally do not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers. Similarly, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.

Employees whose primary duty is management may be exempt as an executive or administrator, though some duties of the position are consistent with those of a first responder. For example, a State park superintendent, whose primary duty is management, would not be considered non-exempt due solely to such first responder-type duties as park ranger, fire control, law enforcement, etc.

Veterans are not exempt administrative, executive or professional employees under Section 13(a)(1) based upon their status as veterans. Military training, for example, generally is not sufficient to meet the requirements for the professional exemption.

No amount of military training will satisfy the requirements of the learned professional exemption because the exemption applies only to employees who are in occupations that have attained recognized professional status, which requires that an advanced specialized academic degree is a standard prerequisite for entrance into the profession. No amount of military training can turn a “blue collar” occupation or a technical field into a profession. For example, a veteran who has received substantial military training as a veteran but works on a manufacturing production line or as an engineering technician is not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA.

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis of the character of the employee’s job as a whole.

Time is not the only test that needs to be considered in determining an employee's primary duty. If an employee spends less than 50 percent of the time in management, that responsibility could still be the primary duty if other aspects of his or her job support that conclusion. Thus, an employee's primary duty cannot be determined by applying a “clock standard.”

FLSA exemptions are subject to the rule of strict construction and are narrowly construed against the employer, which has the burden of proving the exemption. Courts must focus on the actual activities of employees in determining their exempt status under the FLSA and need not rely on position descriptions that are vague and do not directly contradict the employees' testimony concerning their day-to-day job activities.

### **Executive Exemption**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire and fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

### **Administrative Exemption**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the FLSA regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$684 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or the head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

Whether they work for an insurance company or other type of company, insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendation regarding litigation. The status of an insurance claims adjuster, however, does not rely on the "claims adjuster" job title alone. There must be a case-by-case assessment to determine whether the employee's duties meet the requirements for the exemption.

Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.

However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption. In applying the exemption, it does not matter whether the employee's activities are aimed to an end user or an intermediary. The status of financial services employees is based on the duties they perform, not on the identity of the customer they serve.

## **Professional Exemption**

### Learned Professional

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the FLSA regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice.

An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$684 per week, may be classified as exempt. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations and are entitled to overtime pay.

Technologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA because they generally do not meet the requirements for the learned professional exemption. Technologists and technicians do not meet the requirements for the learned professional exemption because they do not work in occupations that have attained recognized professional status, which requires that an advanced specialized degree is a standard prerequisite for entrance into the profession.

#### Creative Professional

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the FLSA regulations) at a rate of not less than \$684 per week; and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

## **Computer Employee Exemption**

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; and;
- The employee's primary duty must consist of:
  1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

## Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made by someone else is not exempt outside sales work.

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

## **Highly Compensated Employees**

The regulations contain a special rule for “highly compensated” employees who are paid total annual compensation of \$107,432.00 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

- The employee earns total annual compensation of \$107,432.00 or more, which includes at least \$684 per week paid on a salary or fee basis;
- The employee’s primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Highly compensated employees must receive at least the full standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. Nondiscretionary bonuses and incentive payments (including commissions) continue to count toward the total annual compensation requirement.

Thus, for example, an employee may qualify as an exempt highly compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

## **V. Classifying Employees**

Misclassifying employees for purposes of complying with federal and state wage and hour laws can be a costly mistake. Employers who mistakenly classify nonexempt employees as exempt can be required to pay fines and back wages due employees. However, an employer can help minimize these risks by establishing procedures governing who is responsible for classifying employees and how classification decisions are made.

While the FLSA includes a wide variety of partial and complete exemptions from its minimum wage and overtime requirements, most employer classification procedures are confined to evaluating an employee’s status under the FLSA’s white-collar exemptions for executive, professional, and administrative employees.

## **VI. Compensatory Time**

The FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of 40 during a workweek. A workweek consists of seven consecutive 24-hour periods, i.e., 168 consecutive hours, designated by the employer. However, a public agency which is a state, a political subdivision of a State, or an interstate governmental agency, may provide compensatory time off in lieu of monetary overtime compensation, provided an agreement or understanding between the employer and the employee is reached prior to the performance of the work.

Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

The FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, the FLSA provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours.

The exemption provided by this subsection authorizes a public agency which is a state, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations) in lieu of monetary overtime compensation that would otherwise be required. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

Under certain prescribed conditions, employees of State or local government agencies may receive compensatory time off, at a rate not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours. Agencies can set lower accrual limits for compensatory time, provided any overtime hours worked beyond the lower accrual limit must be paid at the rate of not less than one and one-half times the regular rate of pay. An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

The 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked. The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986.

Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

## **VII. On-Call Time**

An employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with company officials where he or she may be reached is not working while on call.

## **VIII. Waiting Time**

Whether waiting time is time worked under FLSA depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he or she waited to be engaged." Such questions "must be determined in accordance with common sense and the general concept of work or employment."

Payments for "idle time" — periods when employees are kept off the job by unusual circumstances — may be excluded from employees' regular rates only where such payments are sporadic and infrequent in nature.

Such situations might include:

- A failure by the employer to provide sufficient work
- An inability of employees to reach the workplace because of weather conditions
- The failure of materials to arrive
- Equipment or machinery breakdowns
- Other unexpected obstacles or emergency conditions beyond the control of the employer

Pay for on-call or on-premises waiting time will be excluded from overtime calculations only where such time is not considered hours worked. Even if the time spent on-call cannot be allocated to any specific hours of work, waiting-time pay may still be included in the regular rate if it is paid as compensation for performing a duty of the employee's regular job.

If the unoccupied time is significantly greater during the on-call shifts and employees are free to watch television or sleep, unlike the situation during their regular shift, the waiting-time pay may be excluded from the regular rate.

#### **IX. On Duty**

A driver who works a crossword puzzle while awaiting assignments and a firefighter who plays checkers while waiting for alarms are all working during their periods of inactivity. The time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time effectively for his or her own purposes. It belongs to and is controlled by the employer. In all of these cases, waiting is an integral part of the job. The employee is engaged to wait.

#### **X. Off Duty**

Periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own purposes are not hours worked. He or she is not completely relieved from duty and cannot use the time effectively for his or her own purposes unless he or she is definitely told in advance that he or she may leave the job and that he or she will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him or her to use the time effectively for his or her own purposes depends upon all of the facts and circumstances of the case.

Example: A driver for a State hospital who has to wait while a resident visits an outside physician is working during the appointment. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting.

In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the driver is sent from Charleston to Martinsburg, leaving at 6:00 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6:00 p.m. when he again goes on duty for the return trip, the idle time is not working time. He is waiting to be engaged.

## **XI. Breaks**

Rest periods of short duration, running from five minutes to about 20 minutes, are common in business and industry. They promote the efficiency of the employee and are customarily paid as working time. They must be counted as hours worked and are scheduled at the convenience of the employer. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

On March 23, 2010 the Patient Protection and Affordable Care Act (PPACA) was signed into law, amending Section 7 of the FLSA. This amendment requires employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has the need to express the milk”. Employers are also required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk”.

The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother’s use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public. The FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide greater protections to employees.

## **XII. Meal Periods**

Bona fide meal periods are not work time as long as:

- The employee is completely relieved from duty (uninterrupted). The employee is not relieved if he or she is required to perform any duties, active or inactive (subject to interruption)
- The period is long enough to allow the employee to use it for eating a meal. Thirty minutes is long enough to qualify as a bona fide meal period
- The period occurs at a scheduled hour or within a specified period at a time of day suitable for a normal meal period

Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily, 30 minutes or more is long enough for a bona fide meal period.

A shorter period may be long enough under special conditions. The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating.

For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. It is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period. Unless an agency advises employees that meal periods are subject to interruption, paid meal periods are not authorized.

West Virginia Code § 21-3-10a provides that during the course of a workday of six or more hours, all employers shall make available for each of their employees, at least 20 minutes for meal breaks, at times reasonably designated by the employer. This provision shall be required in all situations where employees are not afforded necessary breaks and/or permitted to eat lunch while working.

### **XIII. Duty of 24 Hours or More**

When an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than eight hours, only eight hours will be credited. Where no expressed or implied agreement to the contrary is present, the eight hours of sleeping time and lunch periods constitute hours worked.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the U.S. DOL has adopted the rule that if the employee cannot get at least five hours' sleep during the scheduled period, the entire time is working time.

If an employee's tour of duty is less than 24 hours, periods during which he or she is permitted to sleep are compensable working time, as long as he or she is on duty and must work when required. Allowing employees to sleep when they are not busy does not render the time uncompensated "sleep time"; nor does the furnishing of facilities to sleep, as long as the employee is still on duty.

#### **XIV. Employees Residing on Employer's Premises**

An employee who resides on his or her employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he or she is on the premises. Ordinarily, he or she may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the Superintendent of a State park who resides on the premises.

#### **XV. Training Time**

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

- Attendance is outside of the employee's regular working hours
- Attendance is in fact voluntary
- The course, lecture, or meeting is not directly related to the employee's job
- The employee does not perform any productive work during such attendance

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary, in fact, if the employee is given to understand or led to believe that his or her present working conditions or the continuance of his or her employment would be adversely affected by nonattendance.

Training is directly related to employee's job if it is designed to make the employee handle his or her job more effectively, as distinguished from training him or her for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily taking such a bookkeeping course, outside of regular working hours, need not be counted as working time.

Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his or her present job, the training is not considered directly related to the employee's job even though the course incidentally improves his or her skill in doing his or her regular work.

Of course, if an employee on his or her own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his or her employer even if the courses are related to his or her job.

There are some special situations where the time spent in attending lectures, training sessions, and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his or her employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his or her job or paid for by the employer.

Time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

- The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. DOL and
- Such time does not involve productive work or performance of the apprentice's regular duties.

If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

## **XVI. Travel Time**

Excluding normal commuting time, the general rule is that employees should be compensated for all travel unless it is overnight, outside of regular working hours, on a common carrier, where no work is done. Travel as a passenger outside of normal work hours is, generally, not working time. Of course, special rules can apply to special situations.

Travel during normal working hours is considered as work time.

The Portal-to-Portal Act specifically excludes from compensation time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity” of an employee and time spent in “activities which are preliminary or postliminary” to the principal activity. Travel time at the beginning or end of the workday, therefore, is not compensable. Note, however, that under the Portal-to-Portal Act, an employer must compensate employees for such time if agreed to in a contract agreement, or if it is customary to do so.

An employee who travels from home before his or her regular workday and returns to his or her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he or she works at a fixed location or at different job sites. Normal travel from home to work is not work time.

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his or her day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers, all time spent on such travel is working time.

The U.S. DOL is taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his or her regular hours to report back to his or her regular place of business to do a job is working time.

A problem arises when an employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city. For example, an employee who works in Charleston, with regular working hours from 9:00 a.m. to 5:00 p.m. may be given a special assignment in Martinsburg, with instructions to leave Charleston at 8:00 a.m. He arrives in Martinsburg at 2:00 p.m., ready for work. The special assignment is completed at 4:00 p.m., and the employee arrives back in Charleston at 10:00 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment.

It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call, or like travel that is all in the day's work. All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual mealtime would be deductible.

Time spent by an employee in travel as part of his or her principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 p.m. and is sent to another job which he finishes at 8:00 p.m. and is required to return to his employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9:00 a.m. to 5:00 p.m. from Monday through Friday the travel time during these hours is work time on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy, the U.S. DOL will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile unless work is performed.

If an employee is offered public transportation but requests permission to drive his or her car instead, the employer may count as hours worked either the time spent driving the car or the time he or she would have had to count as hours worked during working hours if the employee had used the public conveyance.

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat, or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he or she is permitted to sleep in adequate facilities furnished by the employer.

#### **XVII. Adjusting Grievances, Medical Attention, Civic & Charitable Work, & Suggestion Systems.**

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked.

Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

## **XVIII. Definitions**

Away from employer's place of business: An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Customarily acquired by a prolonged course of specialized instruction: The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Customarily and regularly: The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every work week, but does not include isolated or one-time tasks.

Department or subdivision: The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Directly related to management or general business operations: To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Discretion and independent judgment: In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.

The term must be applied in the light of all the facts involved in the employee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; and other factors set forth in the regulation. The fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Effect of deductions: The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

Employer’s customers: An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, employees acting as advisors or consultants to their employer’s clients or customers - as tax experts or financial consultants, for example - may be exempt.

Field of science or learning: Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Invention, imagination, originality or talent: This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee.

Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reports who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals.

Making sales: “Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

Management: Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rated of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other change in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Matters of significance: The term “matters of significance” refers to the level of importance or consequences of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.

Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

Obtaining orders or contracts for services or for the use of facilities: Obtaining orders for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “services” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

Particular weight: Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee’s recommendations may still be deemed to have “particular weight” even if a higher-level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

Primary duty: means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

Recognized field of artistic or creative endeavor: This includes such fields as, for example, music, writing, acting and the graphic arts.

Safe harbor: If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Salary basis requirement: To qualify for exemption, employees generally must be paid at not less than \$684 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$684 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour. Being paid on a salary basis means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work.

Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a salary basis. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Total annual compensation: The required total annual compensation of \$107,432.00 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans and other fringe benefits. There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up payment to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

Two or more: The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Work requiring advanced knowledge: Work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from various facts or circumstances. Advanced knowledge cannot be attained at the high school level.